United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7403

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

LEROY POESS,

Plaintiff-Appellee

against

MARITIME OVERSEAS CORPORATION,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWERING BRIEF OF PLAINTIFF-APPELLEE

DEC 10 1975
SECOND CIR

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THE ISSUES PRESENTED FOR REVIEW

The questions before this Honorable Court are:

(1) Whether there was substantial, credible evidence introduced to permit the jury to return the verdict in favor of the plaintiff;

(2) Whether there was harmful error in admitting or refusing to admit any testimony or documents offered by either party;

(3) Whether the trial offered the jury a fair opportunity to determine the case on its merits, not substantially flawed or prejudiced by misconduct of the attorneys.

STATEMENT OF THE CASE

This suit arose because of defendant's negligence pursuant to the Jones Act, 46 U.S.C. §688; for the unseaworthiness of defendant's vessel

under the general maritime law and for the failure to pay maintenance and cure, in causing an accident and injuries sustained by the plaintiff during the course of his employment as a seaman aboard the defendant's vessel on June 8, 1971.

The matter was tried before Honorable Richard H. Levet, District Judge, and a jury of six, on April 7th, 8th, 9th, 10th, 11th, 14th, 15th and 16th, 1975, resulting in a unanimous verdict for the plaintiff upon Special Verdict that the defendant was negligent "because the other crewmen with whom plaintiff was working in removing the Butterworthing equipment negligently let go of the hose and line; that such negligence was a proximate cause, in whole or in part, of an accident sustained by plaintiff on board the S.S. OVERSEAS ALEUTIAN on June 8th, 1971"; that the plaintiff was not contributorily negligent in the occurrence.

The jury found defendant free of negligence and its vessel not unseaworthy for the claimed failure to provide sufficient numbers of crewmen to carry out the operation of removing the Butterworthing equipment.

Damages of $8,500.00 were found for "past pain, suffering and disability, and for $16,500.00 for "past lost wages". No damages were awarded for future pain and suffering or for future loss of wages.

The maintenance and cure cause was then settled for $440.00 over the amount previously paid by the defendant and is not involved herein.

Post trial motions on written submission for judgment, n.o.v. and for new trial were denied (A20-A40), as was a motion for reargument (A14). This appeal followed.

Defendant's position was not that the accident happened differently than stated by the plaintiff, but that it never occurred (19, 723).

The jury, after hearing the plaintiff testify, the depositions of defendant's employees, testimony of defendant's witness; reading and hearing about multiple hospital records, and testimony of examining doctors, defendant's answers to interrogatories, statements and ship's records, unanimously believed that the events of June 8, 1971 occurred as the plaintiff testified, corroborated by the witnesses and documents.

It was, as the defendant's attorney made it plain in his opening, a clear question of credibility (19), "So, as you see, in this case there will be a very sharp question as to what if anything happened. That being the case, the credibility of Mr. Porss is very

much the issue. I ask you to pay very close attention to the question of credibility"; and in summation (723), "Because, after all, everything in this case depends on the credibility of Mr. Porss because if Mr. Porss is not telling the truth, if this accident he says happened did not, then of course there is absolutely no case."

The case having taken six trial days and the jury having deliberated for one and one-half days, the question of credibility having been presented to the jury over and over again, the Special Verdict having clearly delineated the issues (A9-A12), and the jury having returned a verdict in plaintiff's favor on one theory of negligence, having returned a verdict for the defendant on a second theory of negligence and on the vessel's unseaworthiness, this Court should affirm that verdict, predicated as it

was upon credible, substantial evidence.

STATEMENT OF THE FACTS

Plaintiff, was born in Astonia (25) and now is a United States citizen (26). The Court noted that he was having trouble with his English (61).

Plaintiff was employed by the defendant aboard its vessel as an A.B. (30) on June 6, 1971 (29). He was injured on June 8th, while working on deck with two other seamen during a Butterworthing (tank cleaning) operation (158). The Butterworthing system and operation consisted of a nozzle with multiple holes attached to a 75' long, 2-1/2", 3" or 4" diameter, hose (57, 67, 280, 374, 434) and to a ropeline (57, 65, 67) which was lowered down approximately 35' into the tank from the deck, (45, 57, 161, 167, 435) the hose attached to a water supply on deck (168), the water flowing through the

hose to the nozzle which rotated, spraying and cleaning (159, 168, 169, 170, 171) the tank. The entire apparatus, weighing approximately 95 pounds (nozzle 35-1/2"; 43' of hose 59) (424, 449, 450) would then be raised up from the tank and then lowered into another for the same routine.

Plaintiff stated that in the operation on June 8th, the water was not allowed to drain from the nozzle before being pulled up out of the tank increasing the weight from under 100 pounds to 250-300 pounds (67, 124); that the men working with the plaintiff did not properly hold the hose and nozzle being raised, but allowed them to drop from their hands (77, 80, 81) throwing hundreds of pounds of weight upon the plaintiff; that with the plaintiff holding onto the hose, the apparatus started falling back into the tank, driving plaintiff to his knees, throwing him onto the deck and causing his injuries (77,71,211).

The weight of the hose and the machine as testified to by the plaintiff (67,172) included the water in the hose, as follows:

"Q Can you give us an estimate?

A Three to five hundred pounds, I say.

Q All right.

THE COURT: That is for what, the machine?

THE WITNESS: The hose.

THE COURT: The hose.

THE WITNESS: And the water.

THE COURT: The hose and the machine?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Was the machine attached to the hose when you started picking it up?

A Yes." (67).

And, on page 172:

"Q You say that it weighs how much?

A I said between -- with the hose, the machine, and the water in it, between 300 and 500 pounds." (172).

Further, I was improperly denied the right to read questions and answers from the deposition of Antoniou to obtain from him the weight of the hose and water (294-295) on the incorrect ground that the plaintiff had not made any claim of the existence of water in the hose.

The pulling-up operation consisted of three men (Schmidt, Wherrity and plaintiff) doing the actual continual pulling (65,66,187,191,192).

One man in the center (Schmidt) was next to the tank opening pulling up the hose, machine and line, both hose and line attached to the machine (65,67,68,69,74,75). The center man

cradled the hose in one hand and the rope in the other and with a continual forward bending mo ion of the body coupled with a hand cupping of the hose and line, the apparatus was swept upward, with the hoseman (plaintiff) to the rear left and the lineman to the rear right pulling, gathering up the hose and line as they were passed over to each by the center man (65,67,68,69,74,75,191,192). The lineman, as a braking device to avoid slippage of the rope, hose and machine, was to step on the line during the course of operation as it dropped onto the deck (72,75,192).

Plaintiff testified that the defendant allowed water to remain in the hose while it was being brought up; that the water still inside the hose added enormously to its weight (250-300, 500 pounds and caused the center-man and lineman to lose control of the gear,

causing the entire weight to be shifted to the plaintiff, causing his injury.

The deposition of fellow seaman, Schmidt, was taken by the defendant and was introduced by the plaintiff. Schmidt testified that he sometimes picked up the hose with water in it (384) although he usually didn't (417). He agreed that he didn't grip the hose and line but actually cradled them in his fingertips without gripping, and in effect swept up the hose and line, passing them to each of the other two men in the operation (387,388,389,390); the hoseman and lineman taking up the slack (391).

Plaintiff stated that the lineman did not step on the line (78). As a result the plaintiff took all of the weight (77), suddenly caught all the weight of the machine, hose, line which was falling back into the tank (77). It was the center man who had let go (80) starting

the gear sliding back into the tank (81), the plaintiff taking all of the weight (81) and being driven to his knees (81) down on the deck (81).

Albert Isaac, testified on behalf of the defendant and stated that the Butterworth machine weighed 35-1/2 pounds (424); that water in the hose would substantially increase the weight of the hose (449); that 35' of dry hose would weigh approximately 59 pounds, making the total weight of the dry hose and the machine less than 100 pounds (449-450); his testimony, suggesting to the jury that three men used to raise less than 100 pounds was implausible and clearly implied that water left in the hose was a fairly common occurrence although the defendant's witnesses stated that it <u>should</u> not have been (278, 279, 448-449); that water in the hose could cause injury (297); that it was the Bo'sun's job to

make sure the hose was empty (299); that it should be completely empty (338); but water is left in (338).

The Bo'sun, plaintiff's superior, admitted that the plaintiff reported that his back hurt him during the Butterworthing operation (286), that the next day plaintiff advised the Bo'sun and the Chief Mate, defendant's medical officer that he was hurt during the operation (320).

The accident report signed by the plaintiff almost immediately was consistent with the plaintiff's later testimony: "Describe fully how and where the accident happened." "At the process of pulling the butterworth hose up from the tank onto the deck" (219).

Plaintiff was treated on board the vessel with liniment and sedatives (85), and left the vessel with a Master's Certificate to obtain treatment (88), going immediately to the Public Health Service in New Orleans. He was

marked unfit for duty, fit to travel, returned to New York and ultimately was marked fit for duty in September, 1972. Plaintiff sailed for the first time following the accident on November 20, 1972, more than 17 months later.

Plaintiff said that he again suffered pain in the lower back following his employment aboard that vessel and was again out of work from March 9, 1973 until October 1973. Again in October 1974, plaintiff was marked unfit for duty for two weeks and was out of work for that period.

Dr. George Seaman, a qualified physician and Diplomat in Orthopedic Surgery (468), examined plaintiff on April 14, 1972 and, as a result of multiple tests and x-rays and objective findings of disabilities (475-489), determined that the plaintiff suffered from a "chronic unstable low back" (485).

Again examining the plaintiff on January 27, 1975 (501), Dr. Seaman found that the plaintiff "has a permanent condition and that he is unable to do heavy labor requiring sustained exertion." The doctor testified that the condition that he found both in April, 1972 and January, 1975 were related to the accident of June 8, 1971 (595).

Dr. Seaman explained that plaintiff's prior prostatitis condition was different pain "an annoying sensation in the groin and the very low portion of the back, the sacrum, but not the lumbosacral area." He stated that the symptoms were not the same but were steady and without variation as they were in a disability involving a lumbosacral spine (509).

Defendant's answer to plaintiff's interrogatory number 6 concerning plaintiff's wages showed $506.00 monthy base pay (350) and $47.57 overtime for two days of work. The plaintiff testified that he averaged $400.00 a month

overtime for a monthly total of $900.00 (31). The figures were not contested.

The total of plaintiff's time lost from work as a result of this accident was 17 months in 1971, 1972; more than six months in 1973 following the voyage on the "LONGVIEW VICTORY" and some two weeks in October, 1974 when he was again marked unfit for duty for the low back, for a total of approximately 23 months lost time. At base and overtime wages of $900.00 per month, plaintiff's past lost wages actually amounted to $20,700,00. The jury's verdict of $16,500.00 was clearly consistent with that figure.

ARGUMENT

POINT I

THERE WAS SUBSTANTIAL, CREDIBLE EVIDENCE INTRODUCED TO PERMIT THE JURY TO RETURN THE VERDICT IN FAVOR OF THE PLAINTIFF.

As set forth above, there was more than sufficient evidence that the accident occurred. The jury was early advised that it would be called upon to determine the truth of plaintiff's testimony (19) and for six trial days heard witnesses and saw documents relating conflicting views of the events of June 8, 1971 and plaintiff's conduct both before and afterward; and having deliberated almost two days and returned a unanimous verdict for the plaintiff on one of two claimed theories of negligence, there is before this Court on appeal the question of sufficiency of the evidence permitting the findings of facts by the jury and a denial by the trial Court of the motions for judgment n.o.v. and for a new trial.

The plaintiff's case, as demonstrated by the evidence, clearly showed that the duties of the plaintiff and of his fellow seamen were to raise the machine, hose and line out of the tank; that three men had to do the job; that the machine and the hose, if dry, weighed less than 100 pounds;

that the gear should not have been raised with water in it because it would be very heavy, could cause injury; that gear was sometimes raised with water in the hose; that when the gear involved herein was being pulled up the center man lost control, the lineman didn't brake the load and with water in the hose, bringing the weight up to 300 or more pounds, the plaintiff was pulled forward and thrown to the deck, sustaining injuries.

Defendant claimed that the accident either never occurred, or if it did occur, that the activities of defendant's fellow worker employees were intentional (224,225,227, 228,229,230,241,242,243,244). My objection to questions based upon a concept of intentional tort was sustained (254) since the plaintiff at no time ever suggested or implied that such was the case.

The defendant's records corroborated the happening.

The accident was reported by the plaintiff to his superior, Antoniou, during the continuing Butterworthing operation at 9:30 that evening. It was again reported to the Bo'sun and the Chief Medical Officer of the vessel the following morning when plaintiff found that he could not get out of bed. The condition was treated on board the vessel by the Mate, until the vessel reached New Orleans, at which

time the plaintiff left the ship and was admitted to the Public Health Service Hospital in that city. Under the circumstances, it was quite obvious that plaintiff, in fact, did report the accident immediately.

With the dates of plaintiff's treatments in the various Public Health Service Hospitals before it, and with Dr. Seaman's testimony concerning the plaintiff's chronic, unstable low back, related to the accident and distinct from the plaintiff's prior existing prostatitis, it was again the province of the jury to determine the credibility of the plaintiff, the sufficiency of the evidence and the extent of his injuries and damage.

The suit was predicated upon the failure of the shipowner through its employees, to provide a safe place for the plaintiff to work. Since the facts set forth by the plaintiff related that the negligence of Antoniou in permitting the gear to be raised with water in the hose, drastically increasing its weight, the failure of Schmidt to control the raising of the equipment, causing it to start to slip back into the hold, and the failure of Wherrity to brake the line with his foot, as he was supposed to, all bespoke of negligence and nothing more. There was not ever any in-

dication, inference, implication, that the plaintiff was injured because of anything other than an accident. Throughout the entire trial, the defendant's attorney attempted to create the impression that plaintiff was accusing his fellow workers of an intentional tort, an assault, but the raising of such an issue was rejected by the Court below, being totally outside the scope of the suit.

While Schmidt testified that he worked with the plaintiff in the Butterworthing operation and that the plaintiff was not hurt, he could not identify Porss; Schmidt worked in the morning (382), Porss worked at night; he knew that Porss was on the ship thirty days, Porss was actually off the ship in five days, having spent three of them in bed; that Porss had light hair, Porss had black hair; that Porss worked with im for three days at Butterworthing, Porss was hurt the first day; that Porss worked up to the date he left the ship, Porss was in bed the final three days. It was clear that Schmidt's recollection of Porss was, at best, vague.

Plaintiff obviously was confused by the similarity in names of two of the vessels that he sailed on and denied an injury on the "LONGVIEW VICTORY" until the names of the

vessels were mentioned and explained - and then the plaintiff freely admitted the injury to his thumb aboard that vessel. And the defendant stipulated that the suit involved an injury only for the thumb, not for the back (263).

In any event, the jury heard all of the testimony concerning the accident that befell the plaintiff, heard all of the testimony concerning the plaintiff's report of the accident to his superiors, heard the defendant's work habits, sometimes lifting the gear with water in the hose, heard and saw the medical records, ship's records and statement, all corroborating the plaintiff and returned a verdict in the plaintiff's favor. The trial Judge carefully considered the facts in the case and came to that very conclusion within his power to deny defendant's post trial motions. The credible evidence supports the verdict and calls for an affirmance by this Honorable Court.

National Equipment v. Stanley, 177 F. Supp. 583 (SDNY), aff'd 283 F.2d 600, by this Court, stated the test to be whether there was evidence upon which reasonable men could have reached the jury's result, the evidence viewed in a light most favorable to the prevailing party. Neville v. Union Carbide , 422 F.2d 1205 (3C), questioned only whether the

successful party failed to present a case so that a directed verdict should have been granted, in the motion for judgment n.o.v.

And for a new trial, directed to the Court's sound discretion, whether the verdict was contrary to the clear weight of the evidence, whether there was rational basis for the verdict when viewed in the most favorable light, Zegan v. Central, 266 F.2d 101 (3C); United States v. Acres, 56 F. Supp. 831.

The evidence was credible, not clearly erroneous, sufficient to form a rational basis for the jury's verdict. That verdict should now be affirmed.

POINT II

THERE WAS NO HARMFUL ERROR IN REJECTING DEFENDANT'S INTRODUCTION OF PSYCHIATRIC RECORDS.

The exclusion of testimony was proper as nothing more than a carefully contrived theory of law created solely by defendant's attorney, totally unsupported by any action of the plaintiff. Defendant's attorney, during the trial (224), raised the suggestion that plaintiff's claim was not for negligence but for an intentional tort, an assault. There

was never anything said by the plaintiff about an assault. Plaintiff's deposition never suggested it; it was never suggested during trial; when raised by the defendant's attorney, I rejected the thought by my objection (244); the Court rejected the thought (254); the defendant's attorney could not point to a single statement or action by the plaintiff that implied, either directly or indirectly, that the fellow workers had intentionally let the hose and line slip in order to injure the plaintiff. The imaginative creation of a strawman by defendant's attorney so that it could be destroyed by the occurrence of what he conceived to be a similar intentional tort incident, was soon blown away by the trial Judge as being totally unsupported (254). From that first effort to change the plaintiff's theory, defendant's attorney then attempted to introduce a prior psychiatric condition, approximately one and one-half years before the accident, which condition was then noted to be resolving itself and was seemingly of minor importance by the hospital. The treatment during that period included routine blood-tests for various purposes, including venereal disease. Plaintiff was subsequently marked fit for duty, was working and was never thereafter shown to have been

involved with any psychiatric problems. It is that record that defendant now claims was improperly excluded.

The foundation for the admission of the records gone, of what value were the records (except to prejudice the jury by telling them that the plaintiff had a long prior venereal disease).

The defendant having the burden of showing prejudicial, substantial error, more than harmless (Rule 61 of the Federal Rules of Civil Procedure), and the defendant not raising on this appeal the propriety of the trial Court's rejection of its intentional tort assault theory, the records now sought to be admitted should likewise be rejected and the trial Judge affirmed on point.

The Court below felt that the inclusion of psychiatric treatment was remote and would serve no purpose. (544). The matter was uniquely one of discretion for the trial Judge and should not be grounds for reversal unless it was of such magnitude that it destroyed the opportunity of the defendant to obtain a fair trial.

In veiw of the resolution of plaintiff's minor concerns one and one-half years before the accident and five years before the trial, his fit for duty status shortly after

that report was given and no showing of any recurrence of the condition at any time up to the date of the accident and thereafter throughout all of the periods of his treatment following the accident, it would appear that the trial Judge was clearly acting within his sound discretion in rejecting such testimony and the defendant's attorney's labored efforts to build a strained and warped theory of plaintiff's own lawsuit, all totally unsupported by an evidence or conduct by the plaintiff.

As was stated by this Court in Bowman v. Kaufman, 387 F.2d 582, the excluded evidence must be shown either to have prejudiced the jury or be of crucial importance for the Court to consider reversal.

In Fortunato v. Ford, 464 F.2d 962, this Court held that there would be no reversal on the mere possibility that the exclusion of evidence was harmful, the Court pointing out that Rule 61 required an effect upon substantial rights in order to have the error be considered harmful, the Court pointing out that whether error in any particular case had influence was a fine question of judgment with little precedent to guide the Court.

Ross v. Philip Morris, 328 F.2d 3 (8C) suggested that

the question of admission or exclusion of evidence was discretionary for the trial Court's judgment and would not be disturbed except for clear and prejudicial abuse of discretion.

Skogan v. Dow, 375 F.2d 692 (8C), held that the error must be inconsistent with substantial justice or affect substantial rights of the parties to warrant a reversal.

And in Railway v. Epperson, 240 F.2d 189 (8C) and Purer v. Oktiebalaget, 410 F.2d 871 (9C) it was held that there must be prejudice as well as error for improper reception of evidence to be grounds for reversal.

As stated by the Supreme Court of the United States in The Wanata, 105 U.S. 381, the error must be injurious in its affect of rights of the party to present grounds sufficient for reversal.

Where is the crucial importance of the excluded record when the foundation for which it was sought to be introduced is now extinct?

POINT III

THE TRIAL OFFERED THE JURY A FAIR OPPORTUNITY TO DETERMINE THE CASE ON ITS MERITS, NOT SUBSTANTIALLY FLAWED OR PREJUDICED BY MISCONDUCT OF THE ATTORNEYS.

Without belaboring the point, the black and white of an appellate record lacks the flavor of the trial Court, does not capture the mood of the trial. The person most capable of determining whether the jury was tainted after the exchange and the instruction to the jury was completed was the trial Judge, and Judge Levet expressed his opinion in uncertain terms that the instruction given to the jury permitted a fair trial.

There are some 900 pages of testimony and colloquy in the trial transcript. The trial of this matter ran eight Court days. While the evidence was vigorously presented; with disagreements between counsel and sometimes between trial Judge and either or both counsel; the defendant on appeal cites a half dozen instances over that eight day period which he now asserts caused error so flagrant and substantial that his client was not given a fair trial.

I won't suggest to this Court that, upon reflection, sitting in my law office, reading the record, that some of the statements made during the course of a week and a half trial could have been couched in terms not reflecting the

tentions of trial. The very nature of litigation in an adversary system tells us that lawyers, witnesses, parties and sometimes even trial Judges can make statements that upon later consideration might have been better or nicer phrased.

However, the test is whether the trial was so flawed and the jury so prejudiced, the conduct and air of the trial so intemperate that the parties were not given a fair and equal opportunity.

On page 12 of defendant's brief, in discussing plaintiff's summation (742), the beginning of that summation was nothing other than my apology to the jury for any part played by me for the disruption that occurred during the prior week. Again, the trial was spirited, there were disagreements between attorneys. This Court must decide not whether it was vigorously presented, but whether both parties had a fair trial, whether the verdict was not contrary to inherent justice, Williams v. National, 257 F.2d 771; or as stated in Roy v. Employers, 368 F.2d 902; Wright v. Pfizer, 253 F.Supp. 811; DeVito v. United, [illegible] F. Supp. 88 (SDNY) the conduct or remarks of counsel so clearly prejudicial or uncorrectable, that a new trial should be

considered.

Efforts to apologize were stopped and the jury was told to disregard the remarks on two different occasions (742, 743). So much for the apology.

Page 13 concerning the Wherrity statement, requires that this Court know the background of the statement in my summation. During the course of trial, I wished to read some answers to interrogatories (347).

After presenting defendant's attorney with the number of interrogatories and answers to be read (348), some of which were objected to by defendant's attorney and which were ruled on by the Court (350 through 357) and to introduction of a statement by Wherrity (357 through 361), interrogatory 27 and its answer was read to the jury without objection, as follows (357):

> "27. State the names, addresses, rating and Z numbers of all officers, crew members and eye-witnesses who have given oral or written statements or affidavits concerning the accident complained of herein, and the names of the persons to whom such statements or affidavits were made, the dates thereof, and the names and addresses of the persons who now have custody of said statements or affidavits and, in addition thereto, annex a photocopy of said statements or affidavits."
>
> "27. Boatswain Angelos Antoniou and Seaman Francis Wherrity, copies annexed."

Prior to the reading, the defendant had offered into evidence the statement of Angelos Antoniou (Def. Exh. E) when his deposition was also read (256-346). The statement of Francis Wherrity was not read although I offered to (the jury had just heard that it existed), but which was not permitted upon objection (357-361).

As to my reference in the summation as to the statement of Francis Wherrity, the Court twice clearly instructed the jury to disregard the comment. The statement was not read by me, nor did I offer to read it. All reference by me was to the fact that the Wherrity statement did exist, that I had offered to read it but could not. That the jury knew from the reading, without objection, to interrogatory number 27 and from the proceedings (357-358, 361). In any event, the jury was instructed to disregard the reference not calculated to create such clear prejudice contrary to inherent justice and of such importance that it was more than harmless error.

The trial Court again, at the request of defendant's attorney, instructed the jury to "disregard any reference to the statement of Wherrity." (910)

The reference by me to an appeal (745) was in fact a

reply to the Court's statement as to plaintiff's right to appeal (745). The jury was admonished to disregard the reply comment.

After the summation, after the charge, and on the morning of the third day of jury deliberation, defendant's attorney made application for admission of the same Wherrity statement that he had objected to and which was sustained by the Court. That objection was made on April 9th, a full week before the defendant's attorney changed his mind. At that point, on the 16th, with the trial ended, summations in and the jury having been charged by the Court and deliberating at the beginning of its third day, the admission of the statement at that time I believed would have given it weight far exceeding its actual importance. For the defendant's attorney to argue that on April 9th, I attempted to introduce a statement knowing that the defendant would object, that the Court would sustain the objection, that a week later, after the trial was completed and during jury deliberation the defendant's attorney would attempt to introduce the statement, is the height of absurdity. In short, the time had passed for the statement's introduction, determined to an extent and properly so, by the Court's charge,

delivered on the 14th.

During the course of defendant's cross-examination of a witness a discussion was held in Chambers concerning plaintiff's resolving psychiatric problem, more than one and one-half years before the accident (536-541). When defendant's attorney, obviously attempted to introduce evidence of blood test results to reflect the plaintiff poorly, objection was made and the matter was thoroughly discussed to the effect that the trial Judge directed that phychiatric records and tests given pertaining to them were to be excluded due to remoteness (544, 546, 552). Defendant's attorney unsuccessfully again attempted to tie it to a non-existent cause of action for assault (542-543), but again was stopped by the trial Judge (542-543).

Examination of Def. Exh. J, was made in chambers during the discussion of the phychiatric record of 1970. (541) The Court struck out the pages of the record involving the psychiatric record including laboratory blood tests for venereal diseases (546, 552), all psychiatric, blood and venereal disease tests contained in approximately six pages of the hospital record (548-553).

At trial shortly thereafter the defendant's attorney attempted to renew the issue of plaintiff's prior gonorrhea condition (631). Immediate objection was made and sustained (632). It was a flagrant attempt to reach beyond the Court's ruling concerning plaintiff's irrelevant prior condition of gonorrhea. The discussion (633-637) covered the very issue that had been previously resolved in Chambers. Unfortunately, the trial Judge did not remember the discussion of exclusion of the venereal disease blood tests from the psychiatric record and demanded that I locate the reference. Under the pressure of the moment and considering the volume of hospital records from five hospitals, I could not readily locate it and the defendant's attorney remained silent as I scanned page after page of the hospitals' records, without success. However, they existed, although denied by defendant's attorney and not recalled by the trial Judge. Searching the medical records after trial, I located them in Def. Exh. J. Interestingly, an oblique admission in reference to the exhibit's exclusion of psychiatric and venereal disease tests was made by defendant's attorney during my summation, and was replied to by me, to the effect that he had found the record that I could not. (768,769)

As noted in my summation, it was a "very, very trying week." (742)

The absurdity referred to by the trial Judge (635) was voiced when I could not find the reference to the gonorrhea (now known to be Deft. Exh. J) and to nothing else and was made in the robing room, not before the jury.

The questions involving Dr. Lodico's cross-examination seem to be proper. They were calculated to attack the credibility of a physician employed by the defendant to examine the plaintiff and to testify on its behalf. The question of the weight to be given to his testimony was for the jury and credibility was, and is always, an important consideration in evaluating a non-treating physician's statements.

The sole mention of "insurance" was by me in a question to Dr. Lodico when I asked him whether he often testified on behalf of insurance companies and attorneys. There was no direct implication that he was in fact testifying on behalf of an insurance company in the case. The question was objected to as to form and was sustained. Nothing further was said.

In Smith v. Town, 57 F. Supp. 52, aff'd 150 F.2d 782

(2C); Charleston v. Hennessey, 404 F.2d 539 (5C); Guest v. Duke, 384 F.2d 927 (5C), the mention of insurance was not in and of itself ground for a new trial.

See: Casselmon v. Dunfee, 172 N.Y. 507, in which reference was made to insurance of the defendant, verdict for the plaintiff, affirmed by the Appellate Division, affirmed by the Court of Appeals, the Court stating that it was satisfied that the verdict was not influenced by the remark.

Contrary to what was said in defendant's brief, page 17, a reading of the record will satisfy this Court in very short order that the trial Judge, Honorable Richard H. Levet, did not favor the plaintiff in his rulings.

Only if the remarks or conduct of counsel are clearly prejudicial, or where the Court does not correct the jury if required by the circumstances should a new trial be considered. Roy v. Employers, 368 F 2d 902; Wright v. Charles Pfizer, 253 F. Supp. 811; DeVito v. United, 98 F. Supp. 88. Only where it is required should there be a new trial. Siegel v. First Pennsylvania, 248 F. Supp. 249.

Bowman v. Kaufman, 387 F.2d 582 (2C), involving improper

argument with instructions by the Court to disregard was held not to be grounds for a new trial absent a showing that the argument had substantial effect on the verdict.

Brown v. Walter, 62 F.2d 798 (2C), was a persistent continual effort by the plaintiff to keep before the jury the fact that the defendant was insured (1933 matter in Vermont). The attorney, so said this Court, spun a web of suspicion suggesting that the whole defense was fabricated by an unseen hand, and unseen force, an alien and malevolent corporation lurking in the background, and was reversed as failing to afford a fair trial.

In the case of Kiefel v. Las Vegas, 404 F.2d 1163 (7C), there were assertions of facts not proved and used as a foundation for impeachment, never offered; examination on exhibits not offered in evidence; meritless objections; concealment of a deposition; all by an attorney who had a history of misconduct; the objections to the misconduct sustained but not followed by instruction to the jury to disregard. The Court held that the failure to do so was error, that the case should be an impartial consideration of evidence and the applicable law, a fair chance to pre-

sent the facts of the case to the jury.

Van Iderstine v. RGJ Contracting, 480 F.2d 454 (2C), involved an attorney making unfair or derrogatory personal reference to his opposing counsel; using haranguing and offensive tactics; making repeated unfair criticisms of opposing counsel, slanderous and abusive to his adversary all were criticized in the strongest terms by this Court, while affirming the jury verdict, since most of the abuse was meted out in the robing room.

Koufakis v. Carvel, 425 F.2d 892 (2C), suggested that a trial was a reasoned and reasonable search for justice between the parties (901); that continual references to matters not in the record; references to the "Mafia"; that defendant was a top leader in the Mafia; with repeated references that the defendant coerced little guys, slanderous and baseless epithets used; the failure of the trial Judge to stop with appropriate instructions to the jury to disregard was "tacit" approval. The concept of the trial taken on the aspect of the little and virtuous man of modest resources against the powerful and unscrupulous man of untold wealth could not but help to destroy the reasoned

search for justice. The matter was reversed where the level of misconduct was as was spelled out in the Koufakis case.

Needless to say the case at bar does not compare.

Merritt-Chapman v. Frazier, 289 F.2d 849, affirmed a denial of a motion for a new trial in which it was contended that the plaintiff's counsel caused an inadmissible report of the Bureau of Reclamation to be marked for identification and improperly asked a witness whether he knew that the report of the investigation had been made.

Only where the verdict is so contrary to inherent justice should a new trial be granted even where it was contended that the general manner of conduct of the attorney in making objections, insinuations, and voluntary statements and in interrupting witnesses, the Court, and counsel without adequate restraint and timely corrective action by the Court effecting the trial with confusion and unfounded implications.

The question in all cases is whether the verdict was so contrary to inherent justice. Williams v. National, 257 F.2d 771.

The cases cited by the defendant show reversals for

flagrant, continual, repeated, personal attacks, or where the trial Judge failed to advise the jury, and are so far in excess of the isolated remarks over eight days of trial that they are beyond comparison.

The remarks were not clearly prejudicial, nor were they calculated to affec the jury's earnest and determined effort for almost two days to provide a fair verdict.

The verdict was fair, the parties were given every opportunity to present their case. The jury did, as juries are supposed to do, determine the basic question of credibility. It believed the plaintiff, it did not believe the defendant.

CONCLUSION

THE VERDICT SHOULD BE AFFIRMED.

Respectfully submitted,

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Service of 3 copies of this within
Brief is admitted this
1st day of Dec 1975
Walker & Cross
ATTORNEY FOR Defs appellt